IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 31.07.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

Cross Objection.No.42 of 2002
in
SA.No.2108 of 2001

1.The Union of India, rep. by
The Chief Secretary, Govt. of
Pondicherry.

2.The Secretary to Government,
Public Works Department,
Govt. of Pondicherry.

3.The Superintending Engineer,
Buildings & Roads Circle-I,
Public Works Department,
Govt. of Pondicherry.

4.The Executive Engineer,
National Highways (Division),
Public Works Department,
Pondicherry. ...Cross Objectors/Respondents

Vs

M.Nadarajan ...Respondent in Cross objection/
Appellant

PRAYER: This Cross Objection filed under Order 41 Rule 22 of Civil Procedure Code, against the findings in the Judgment and Decree dated 18th October, 2001 on the file of the Principal District Judge, at Pondicherry in AS.No.55/2001 reversing the Judgment and Decree dated 09.07.2001 in O.S.No.273 of 2000 on the file of the District Munsif at Pondicherry.

For Cross Objectors : Mr.J.Kumaran(Pondicherry)
Government Advocate

For Respondent : No appearance

JUDGMENT

This Cross Objection has been filed by the respondents/defendants against the findings of the Principal District Judge, Pondicherry in the Judgment and Decree passed in A.S.No.55 of 2001 dated 09.07.2001.

2. The respondent herein has filed a suit in O.S.No.273 of 2000 on the file of the I Additional District Munsif, Pondicherry for declaration that the Order No.83/PW/SE-I/W/ASW/F83/2000 dated 11.04.2000 as illegal, void and unsustainable on facts and for injunction restraining the defendants from enforcing the said order.

3. The learned District Munsif by the Judgment and Decree dated 09.07.2001 has decreed the said suit as prayed for. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.55/01 on the file of the Principal District Judge, Pondicherry. The learned Principal District Judge by the Judgment and decree dated 18.10.2001 has allowed the said appeal and set aside the Judgment and Decree passed by the trial Court and dismissed the suit with costs. Feeling aggrieved, the plaintiff has filed the second appeal in S.A.No.2108 of 2001. The defendants have filed the present cross objection challenging the findings of the first Appellate Court.

4. When the second appeal came up for hearing on 26.06.2018, the learned Counsel for the appellant has made an endorsement stating that he is reporting no instructions. Hence, the appellants were called absent and this second appeal was dismissed for default. On that date, the present cross objection was not listed. Subsequently it was brought to the knowledge of this Court with regard to the pendency of the cross objection. Accordingly, the cross objection has been listed for hearing today.

5. Already the appellant was called absent and consequently second appeal was dismissed for default. In this matter also, the appellant called absent. After hearing the arguments of Mr.J.Kumaran, learned Government Advocate, Puducherry and perusing the Appellate Court's Judgment and Decree and other records, judgment is being passed in this cross objection.

6. The learned Government Advocate has submitted that there is an arbitration clause in the agreement and in view of the said clause, the plaintiff should have opted for arbitration, but contrary to the same, he has filed the above suit. He further submitted that without considering the same, the first appellate Court has erred in holding that there is no bar for filing the suit and hence he prayed to set aside the said finding.

7. At this juncture, it would be relevant to refer Section 8 of the Arbitration and Conciliation Act, 1996 which reads thus:-

> "Power to refer parties to arbitration where there is an arbitration agreement - 2 (1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration

unless it finds that Prima facie no valid arbitration agreement exists.

2.The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party before that Court.]

(3)Notwithstanding that an application has been made under sub-Section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

8. If any petition is filed under Section 8 of the Arbitration and Conciliation Act, 1996, then it is for the Court to decide the said application before taking up the matter for trial on merits. In the case on hand, it is not stated that the defendants have filed any such application before the trial Court. Without filing any such application, it appears that they have filed the written statement and went for trial and suffered decree before the trial Court. Only before the first Appellate Court, for the first time, it appears that they have raised this point. Hence, the first appellate has held that the defendants before filing of their written statement should have filed petition to refer the parties for arbitration as contemplated under Section 8(1) of the said Act, 1996. The said finding is only in accordance with law and the same cannot be set aside. Hence this Cross Objection has to be dismissed.

9. In the result, the Cross Objection is dismissed. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To
1.The Principal District Judge,
  Pondicherry.

2.The I Additional District Munsif, Pondicherry

Copy to:The Section Officer,
        VR Section,
        High Court, Madras

CA(CO)
sm:15.10.2018